

## ***7 Official Opinions of the Compliance Board 264 (2011)***

- **Minutes**
  - **Generally**
    - summaries of closed-session actions to be provided in minutes of next open session – minutes to be approved promptly
- **Administrative Function**
  - **Outside Exclusion**
    - citizens' committee created by informal consensus not a public body
    - discussion about whether to create a citizens' committee required to held in public session
- **Compliance Board, Authority and Procedures**
  - **Motion for reconsideration**

July 26, 2011

*Paula Bienenfeld*  
*Rosanne A. Hurwitz*  
*Louis Wilen*

We have considered the complaint of Paula Bienenfeld, Rosanne A. Hurwitz, and Louis Wilen (“Complainants”) that the Montgomery County Board of Education (“County Board”) violated the Open Meetings Act (the “Act”) with respect to the minutes of three closed sessions and a citizens’ committee appointed by the County Board to participate in the process of hiring a new superintendent.

For the reasons stated below, we find that the Board violated the Act in some respects and not others. We shall state the facts in the discussion.

### **I**

#### **Discussion**

***A. Whether the County Board violated the Act by not posting minutes of its December 7, 2010, March 8, 2011, and March 28, 2011, closed meetings.***

Complainants allege that the County Board violated the Act by “fail[ing] to post minutes from the closed meeting sessions of December 7, 2010, March 8, 2011, and March 28, 2011.” The County Board responds that the Act does not require a public body to disclose its closed-session minutes and that the County Board complied with the Act’s requirement that the minutes of the open sessions subsequent to those closed sessions contain summaries of the actions taken in the closed sessions. The County Board argues that the Complainants “[have] the burden of proving a violation.”

The Act does not require a public body to disclose the minutes of a properly-closed session. The Act instead provides that such minutes “shall be sealed and may not be open to public inspection,” and that the public body may decide to unseal them. State Government Article (“SG”) §10-510 (c) (3) and (4). Therefore, to the extent that the three sessions were properly closed, the County Board did not violate the Act by failing to make those minutes available.<sup>1</sup> The Act also does not require a public body to post its minutes online.<sup>2</sup> We turn next to the County Board’s summaries of its closed sessions.

The Act requires a public body to include certain information about a closed session “in the minutes for its next open session.” SG §10-509(c)(2). The County Board summarized the December 7, 2010, meeting in its January 11, 2011, minutes. On January 11, 2011, the County Board approved the minutes of a December 15, 2010, meeting and other meetings dating back to November 4, 2010. If the December 15 meeting, which appears to have been devoted to the presentation of a budget to the County Board, was the “next open session” after the December 7 meeting, the summary of the December 7 closed session should have appeared in the December 15 minutes. While the General Assembly provided public bodies some leeway in the preparation of minutes by stating that minutes should be prepared “as soon as practicable” after the meeting, it did not provide the same leeway for the creation of closed-session summaries. *Compare* SG §10-509(b) *with* §10-509(c)(2). The requirement that closed-session summaries be promptly included in open-session minutes makes sense: while actions taken in an open session are immediately ascertainable by the public, the public’s knowledge of closed-session actions depends entirely on the issuance of the summary. We encourage the County Board to continue its practice of attaching a draft closed-session summary to the agenda for the next open meeting and to approve its minutes more promptly.<sup>3</sup>

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<sup>1</sup> The March 8, 2011 meeting was closed partly to discuss the “use of real property.” As we noted in 7 *OMCB Opinions* 208 (2011), which involved allegations about meetings the County Board closed in 2010, the County Board’s decisions to close meetings to discuss the “use” of real property lack a basis in the Act; the “real estate exception” applies only to discussions about the acquisition of real property. SG §10-508(a)(3). The parties have not addressed, and nor shall we address, the question of whether the discussion fell within the exception.

<sup>2</sup> No complaint has been made about the methods used by the County Board to deliver information to the public; they are commendable. The County Board posts its minutes and archived minutes online and in a searchable format, posts streaming and subtitled video of its meetings, and posts announcements about its meetings shortly afterwards.

<sup>3</sup> Effective June 1, 2011, the Act was amended to allow a public body to substitute live, streaming, and archived audio or video for written minutes. SG §10-509(b). If a public body chooses to make such a substitution, the summary of any closed session should be presented during the next open session.

The March 8, 2011, closed session was timely summarized in the March 28, 2011, minutes. The March 28, 2011, closed session was summarized in the April 28, 2011, minutes, rather than in the minutes of the “next open session,” which apparently occurred as a specially-called meeting on April 25, 2011. Nonetheless, the public received the substance of the summary in a timely fashion, and the County Board substantially complied with the Act, if, in that case, the County Board followed its usual practice of attaching a draft closed-session summary to its agenda three days in advance of the regular meeting.

We turn to the County Board’s legal proposition that the Complainants bear the burden of proof. That proposition applies only in actions brought in circuit court to enforce the Act, *see* §2-510(c) of the State Government Article (“SG”); it does not apply to complaints submitted to us under SG §10-502.5, and we have not applied it here.

***B. Whether the Act applied to the Board’s creation of the citizens’ committee and to the committee itself***

Complainants allege that the County Board violated the Act by creating in a closed session a committee of citizens to assist it in its selection of a new superintendent and allowing that committee to meet in closed sessions.<sup>4</sup> The County Board responds with three arguments: first, that the committee was created by informal consensus and so was not a public body subject to the Act; second, that the committee was performing an administrative function not subject to the Act; and, finally, that the Act permits the discussion of personnel matters in closed session. The County Board further states:

[T]he informal consensus pursuant to which the citizen’s committee was created was reached at a meeting of the Board held to discuss the appointment of a new Superintendent of Schools. Because the topic of the meeting was not subject to the Open Meetings Act (the “Act”), there are no minutes of that meeting. Because the purpose of the citizens’ committee meetings was to interview candidates for superintendent, there were no minutes taken for those meetings, either.

We begin with the County Board’s assertion that the meeting at which it created the citizens’ committee was not subject to the Open Meetings Act because the appointment of a new superintendent fell within the County Board’s administrative function. The County Board cites an opinion in which we addressed meetings held by school boards to evaluate a superintendent’s performance, *see, e.g.* 1 *OMCB Opinions* 123, 125 (1995), and various opinions involving other public bodies’ evaluation and appointment of employees in the exercise of their administration of existing law assigning that

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<sup>4</sup> Complainants state, “The inclusion of unknown community members as part of the search process was a public meeting that was convened without public notice or an agenda.” We interpret this allegation to include both the County Board’s and the citizens’ meetings.

function to them. Here, however, the County Board's meeting involved the arrival at a consensus on creating a citizens' committee to participate in the appointment process, and the County Board has not directed us to an existing law which would make that action merely administrative in nature. The County Board's meeting therefore comes closer to the meeting we addressed in 4 *OMCB Opinions* 163, 166 (2001), where a school board met to develop its guidelines for identifying candidates to recommend for a gubernatorial appointment. Although we noted there that the appointment function in question belonged to the Governor and so was not within the school board's administrative function, we also remarked that the school board, in discussing "important matters like the opportunity for citizen comment," was engaged in the creation of policy. *Id.* Discussions about whether and how to involve the public in the hiring process implicate policy matters not involved in the administrative function of evaluating and interviewing candidates. Accordingly, the County Board was not merely exercising an administrative function when it decided to create a citizens' committee, and it violated the Act by not discussing that topic in open and in accordance with the procedures set forth in the Act.<sup>5</sup> We encourage the County Board to unseal and make available for inspection any closed-session minutes, or portions thereof, that pertain to discussions that should have been held in the open.

Finally, we turn next to the question of the application of the Act to the citizens' committee itself. The Act applies only to a "public body," as defined by the Act. §§10-505; 10-502(h). An entity may become a public body in any of three ways: creation by a formal legal instrument, such as a law, rule, resolution, bylaw, or executive order; appointment of certain persons by the Governor or local government executive, or by someone subject to that official's direction; or appointment of certain persons by an entity in the

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<sup>5</sup> On December 16, 2011, after we issued this opinion, the County Board requested that we reconsider our conclusion that the creation of a citizens' committee to participate in its hiring process was not an administrative function. As we explained in 3 *OMCB Opinions* 255 (2003), we grant such requests only sparingly:

The Open Meetings Act contains no explicit authorization or procedure for reconsideration. While it may be argued that the Compliance Board has inherent authority to reconsider its opinions, the lack of explicit authority implies that the Board should do so, if at all, only sparingly. One compelling basis for reconsideration would be a public body's discovery of important new information that calls into serious question the Board's prior determination. Conversely, the Board will not entertain a request for reconsideration simply because a public body submits information that it could have provided in its response to the complaint and that merely expands upon a point already considered.

*Id.* at 256. Here, the County Board has not presented us with new facts, and so we deny the request. In any event, our application of the "administrative function" exclusion comports with our prior application of the term, as specially defined by the Act.

Executive branch of State government. SG §10-502(h). The County Board's citizens' committee, created by informal consensus, does not meet any of the statutory definitions. *See* 1 *OMCB Opinions* 69, 71 (1994) (finding that subcommittees created by informal action of public bodies were not themselves public bodies). We therefore find that the County Board's citizens' committee was not itself a public body and that the committee's meetings were not subject to the Act.

We need not reach the County Board's alternative argument that, in any event, the committee's meetings were administrative in nature and would not have been subject to the act. We note, however, that the administrative function exclusion can only be claimed by an entity "vested with legal responsibility for ... the administration" of the existing law or policy in question. 4 *OMCB Opinions, supra*, at 166.

## **II**

### **Conclusion**

We conclude that the County Board substantially complied with the Act's requirement that summaries of actions taken in closed sessions be included in the minutes of the next open meeting. While the Act does not require the County Board to disclose the minutes of properly-closed sessions, the County Board should disclose any minutes of discussions that it conducted in closed sessions, but should have conducted in public.

We conclude that the County Board was not exercising an administrative function when it decided to create a citizens' committee. In light of our recent opinion on the County Board's reliance on that exclusion for a different discussion, *see* 7 *OMCB Opinions* 208 (2011), we encourage the County Board to close its meetings more sparingly. The citizens' committee was not subject to the Act and so did not violate it.

OPEN MEETINGS COMPLIANCE BOARD

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